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BEFORE THE
Federal Communications Commission
WASHINGTON, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

Amendment of Section 73.202(b),
Table of Allotments,
FM Broadcast Stations.
Littlefield, Arizona

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)
)
)
)

MM Docket No. 99-282
RM-9710

To: The Commission

APPLICATION FOR REVIEW

Mountain West Broadcasting ("Mountain West"), pursuant to Rule 1.115, files this Application for Review of the *Memorandum Opinion and Order*, 2000 FCC LEXIS 5856 (November 3, 2000) ("Reconsideration Order").¹ In its *Reconsideration Order* the Commission denied Mountain West's proposal to allocate Channel 265C to Littlefield, Arizona. The Commission determined that Littlefield was not a community for allotment purposes.

The Commission's *Reconsideration Order* erred for three reasons. First, contrary to past precedent, it refused to consider new evidence submitted clearly demonstrating that Littlefield, Arizona is a community. Secondly, it failed to properly consider the information initially provided by Mountain West which also demonstrates that Littlefield, Arizona is a community. Lastly, it appears that the Commission's reluctance to consider allocation of Channel 265C to Littlefield, Arizona may be explained by the fact that allocation of Channel 265C to Littlefield, Arizona would require KONY-FM, operating on Channel 266C in Kanab, Utah, to switch channels. This, however, cannot serve as a bar or impediment to grant of the allocation of Channel 265C to Littlefield, Arizona since the Littlefield Rulemaking was filed prior to the KONY-FM modification application to upgrade its facilities to Channel 266C.

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¹ This Application for Review is timely filed. The *Reconsideration Order* was published in the *Federal Register* on November 20, 2000. See 65 Fed. Reg. No. 224, Page 69693 (November 20, 2000).

**1. The Commission Failed to Properly Consider
the Data Submitted in the Initial Rulemaking.**

In its *Reconsideration Order* the Commission denied the Petition for Reconsideration explaining only that it would not accept new information provided by Mountain West on the community status of Littlefield, Arizona. The Commission failed to respond to Mountain West's claim that it had already demonstrated that, even absent the supplemental data, Littlefield, Arizona is a community for allocation purposes. As noted by the Commission, Mountain West argues in its Petition for Reconsideration "that the information previously provided regarding Littlefield was sufficient to meet the threshold criteria for community status." This is true, but the Commission has failed to respond.

In the initial *Report and Order*, 15 FCC Rcd. 10263, 2000 FCC LEXIS 1987 (April 14, 2000) ("Initial Report and Order") the Commission concluded, "Petitioner provided no official documentation to support the population attributed to Littlefield, nor did the Petitioner identify the several retail businesses that it attributes to Littlefield, or provide street addresses to identify their presence at that locality." *Id* at ¶ 5. In its *Comments on Proposed Rulemaking*, however, Mountain West specifically cited the 1998 Rand McNally Commercial Atlas and Marketing Guide as support for the 100 person population of Littlefield -- a source regularly used by the Commission. Mountain West also specifically identified several Littlefield retail businesses and schools: Hidden Valley Preserve, the Littlefield Golf Course, the Littlefield Post Office, Beaver Dam Service Station, Beaver Dam Lodge, the Littlefield Elementary School, Virginia Valley School, and Littlefield Community College. The address and location of all these businesses and schools in Littlefield are specifically confirmed in attachments to Mountain West's Comments from "YellowPages.com." Each is specifically listed with an address in Littlefield. One business address of Beaver Dam Lodge is specifically listed as Highway 91, Littlefield. The fact some of these businesses lack specific street

addresses does not mean they are not located in Littlefield anymore than the fact that just because the IRS in Philadelphia has no street address somehow raises questions whether the IRS is located in Philadelphia. Furthermore, the Commission has recognized that the name of the community in a business name is an indicia of community status. *See, Evergreen, Montana*, 15 FCC Rcd. 9148 (2000) at n. 3. Even when addresses are not provided the Commission routinely conducts its own research to provide addresses. *See, St. Regis, Montana*, 15 FCC Rcd. 11655 (2000) at n. 2. ("In addition, staff research found the following businesses have Saint Regis addresses.") Yahoo Yellow Pages would have confirmed not only the location of all these businesses and schools in Littlefield, but would also have provided street addresses for some of these businesses. *See Exhibit 1.*

Mountain West also demonstrated that Littlefield has its own volunteer fire department, post office, zip code, and telephone exchange. Mountain West provided white page listings providing names and addresses of individuals who consider themselves to be part of the Littlefield community.²

Even considering only the criteria submitted in the original Rulemaking, Mountain West demonstrated adequate indicia Littlefield's status as a community. The Commission has found that communities indistinguishable from Littlefield are communities for allocation purposes. The Commission determined Semora, North Carolina, with a population of 150, a volunteer fire department, a civic organization, and two churches is a community. *See Implementation of BC Docket No. 80-90 to Increase the Availability of FM Broadcast Assignments (Semora, North Carolina)*, 5 FCC Rcd. 934 (1990). Redwood, Mississippi was found to be a community, with a population of only 200, 10 businesses, 1 church, a volunteer fire department, post office, and no municipal government or other services except providing electricity. In *Arnoldsburg, West Virginia*, 15 FCC Rcd 9210, 2000 FCC LEXIS 2927 (May 26, 2000), the Commission concluded that

² Even REC Networks ("REC"), an opposing party, admitted Littlefield had its own wildlife preserve, golf course and fire department.

Arnoldsburg, West Virginia, with a population of 140, a post office, zip code, elementary school, and 16 businesses, is a community. *See also, Sulphur Bluff, Texas*, 15 FCC Rcd 9699 (2000) (Sulfur Bluff a community -- population 200).

Also to be considered is that Littlefield is a desert community distant from other communities. The nearest town is Mesquite, Nevada, nine miles away. *See Cal -Nev-Ari, Boulder City, and Las Vegas, Nevada*, 14 FCC Rcd. 17153 (1999) at ¶ 4, 7 ("Cal-Nev-Ari is an isolated population pocket...."); *see also, Sulphur Bluff, Texas*, 15 FCC Rcd. 9699 (2000) at ¶ 2 ("...a sense of community derives from the fact that there is no other nearby town to serve the needs of nearby ranchers and dairy farmers.")

The community data, if it had been properly considered by the Commission would have supported determining that Littlefield is a community. As it is, the Commission failed to properly consider the data submitted in its *Initial Report and Order*. Despite the fact that Mountain West questioned short comings in the Commission's *Initial Report and Order*, the Commission has failed to respond, stating only that it would not consider new information. It has not acknowledged or addressed any possible error in its analysis of the information initially submitted.

2. The Commission's Arbitrary Failure to Consider New Information.

The Commission has arbitrarily refused, contrary to its own precedent, to consider new information provided by Mountain West that further demonstrates that Littlefield is a community. The Commission rejected these new facts based on Rule 1.429(b), claiming the facts do not relate to changed events, could have been ascertained earlier, and lastly, that consideration of the facts is not required by the public interest. In *Moncks Corner*, 15 FCC Rcd. 8973, 2000 FCC LEXIS 2647 (May 19, 2000), the Commission recently granted a Petition for Reconsideration and found that Sampit, South Carolina was a community based on substantial supplemental information provided

for the first time on reconsideration. The Commission considered the supplemental information based on fairness and its interest in ruling on the full merits of the proceeding. *Id* at ¶ 12. The petitioner in that proceeding was proposing to allocate a first service to a community just as is Mountain West. In granting review of the supplemental information, the Commission did note that the *Reconsideration Petition* was petitioner's first opportunity to address issues raised concerning whether Sampit is a community. Nevertheless, the fundamental underlying principle is that consideration of the supplemental information resulted in a public interest benefit by finding that Sampit was a community and allocating a first service. Likewise, the public interest would be benefitted by similar consideration of the supplemental information provided by Mountain West in concluding that Littlefield is entitled to its first radio service. It is also worth noting that, although the petitioner in *Moncks Corner* could have submitted the information in its Petition for Reconsideration earlier, it didn't.

Likewise, in *Columbia, California*, 7 FCC Rcd. 6302 (1992), the Commission gave full consideration to a Petition for Reconsideration which provided supplemental information concerning the community status of Columbia, California. Although the Commission's determination that Columbia, California is a community was based on reexamination of the original documents submitted by the petitioner in response to the *Notice*, the Commission gave full consideration to the Petition for Reconsideration. *See Id.* at ¶ 8.

When considering the additional information provided in the Petition for Reconsideration, it is even more evident that Littlefield, Arizona is entitled to community status. Littlefield has over 27 businesses, 2 schools, 1 community college, its own fire department, its own post office, its own zip code, governmental services, its own telephone exchange, 1 church, and residents who clearly identify themselves with Littlefield. *See* Exhibit 2. Mountain West also provided statements from

individuals who reside in Littlefield, who consider Littlefield a community, and who have a sense of unity and involvement in the community, including its educational, recreational, religious, business, and residential facilities and services. Also provided was a declaration of a research paralegal who, after speaking with numerous identified individuals, reported that those individuals considered Littlefield, Arizona to be a community, a distinct population grouping, with its own interests, businesses and services. See Supplement to Reply to Opposition to Petition for Reconsideration.³

3. The Littlefield Rulemaking Was First Filed and Has Priority Over the Conflicting Authorization Issued to Station KONY-FM to Operate on Channel 266C at Kanab, Utah.

The Commission notes in footnote 1 of its *Initial Report and Order* that the allotment of Channel 265C to Littlefield is considerably short spaced to the authorization issued to station KONY-FM to operate on Channel 266C in Kanab, Utah. The Commission acknowledged that the Mountain West proposal to allocate Channel 265 to Littlefield (filed on March 3, 1999) was filed prior to the KONY-FM one step upgrade. KONY-FM filed its one-step upgrade application on March 11, 1999 and it was accepted for filing on March 25, 1999 and granted on June 11, 1999.

Any reluctance to rescind the KONY-FM construction permit should in no way increase the threshold requirements for establishing Littlefield as a community. Undersigned is aware of no precedent in which a mistaken grant of a construction permit can be considered as a public interest factor. On the contrary, the Commission has made it quite clear that the first-filed rulemaking is to

³ The Commission in Note 3 of its *Reconsideration Order* referring to the statements provided by Mountain West states, "Those residents define community as 'a grouping of people in a distinctive geographical area.' However, the Commission has stated that mere geographical location is not sufficient to establish community status." First, those individuals did not refer to Littlefield as a mere grouping of people in a distinctive geographical area. They also stated that they consider themselves a part of a community with its own businesses and services. Furthermore, the Commission specifically noted in *Columbia, California*, 7 FCC Rcd 6302, 1992 FCC LEXIS 5624 (September 28, 1992), "If a community is not listed in the U.S. Census or incorporated, the proponent of an allotment must show the location to be a geographically identifiable population grouping." *Id* at ¶ 11.

be protected. As noted by the Commission recently in *Ankeny and West Des Moines, Iowa*, 2000 FCC Lexis 877 (February 25, 2000):

Since Fuller-Jeffrey's rulemaking proposal was filed before the Ottumwa application, it was entitled to protection under the Commission's policy and rules set forth in *Conflicts between Rulemaking Proposals and Applications*, 7 FCC Rcd. 4917 (Comm. 1992), *recon. granted in part and denied in part*, 8 FCC Rcd. 4743 (Comm. 1993). ...Under these circumstances, it would be unfair to the rulemaking petitioner to consider that its proposal is now unacceptable because of a short-spacing that was subsequently and properly authorized by the staff. We have taken this approach in some prior cases and reaffirm their applicability. *See e.g., South Burlington, Vermont*, 6 FCC Rcd. 7111 (Allocations Branch 1991). [emphasis added.]

As the first filed, Mountain West's proposal to allocate Channel 265C to Littlefield, Arizona is protected with respect to the later filed KONY-FM upgrade.

In note 4 of the *Reconsideration Report and Order* the Commission states, "To the extent that Petitioner also challenges the authorization issued to KONY-FM, Channel 266C, Kanab, Utah, it did not file a separate petition for reconsideration of that action, which has become final." Mountain West notes that the Commission's final action on KONY-FM became final long before the Commission issued its *Initial Report and Order*. Mountain West was not aggrieved until the Commission issued its *Initial Report and Order* and, therefore, had nothing to contest. Commission rules and precedent require that the Mountain West rulemaking be given precedence over the KONY-FM upgrade, and Mountain West had every expectation the Commission would follow those rules and precedent. It is only when it did not in the *Initial Report and Order* that Mountain West had a basis to appeal. Mountain West could also reasonably expect that the Commission would follow its policies in *Conflicts Between Rulemaking Proposals and Applications*, 7 FCC Rcd. 4917 (Commission 1992), *Recon. granted in part and denied in part*, 8 FCC Rcd. 4743 (Commission 1993) ("Conflicts Order"). In note 12 of its *Conflicts Order* the Commission noted that it would attempt to resolve any conflict between a rulemaking and a later filed FM application by considering

alternate channels. In that regard, Channel 265C can be allocated to Littlefield if Channel 267C is substituted in lieu of Channel 266C in Kanab, Utah. *See Petition for Reconsideration*, Engineering Exhibit B.

4. Conclusion.

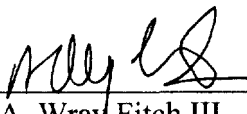
The Commission erred by not concluding that Littlefield is a community based on the information provided during the initial rulemaking proceeding. The Commission further erred by failing to consider the supplemental data submitted by Mountain West with its Petition for Reconsideration which further underscored Littlefield's status as a community.

WHEREFORE, Mountain West respectfully requests that Channel 265C be allocated to Littlefield, Arizona.

Respectfully submitted,

MOUNTAIN WEST BROADCASTING

GAMMON & GRANGE, P.C.
8280 Greensboro Drive, 7th Floor
McLean, VA 22102-3807
(703) 761-5000

By 
A. Wray Fitch III
Its Attorney

December 20, 2000

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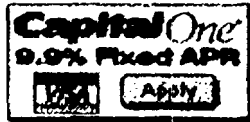
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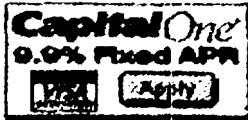
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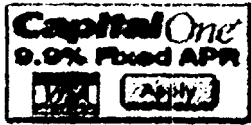
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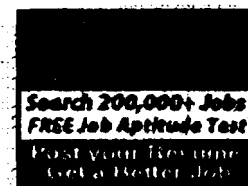
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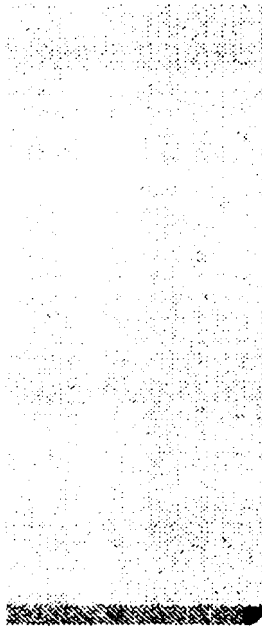
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
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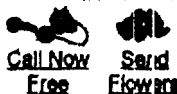


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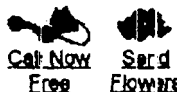


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Minor, Ernest
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Phone: 520-347-5855
Find old high school friends



Mitchell, Andrew
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Mitchell, Stan and Jill
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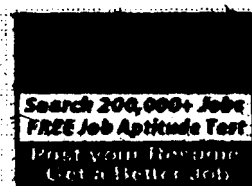


<<prev 10

Listings 1-5

next 10 >>

new search



data by **ACORN**

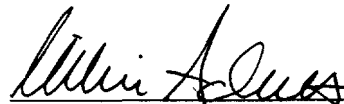
CERTIFICATE OF SERVICE

I, Millie Adams, in the law offices of Gammon & Grange, P.C., hereby certify that I have sent this 20th day of December, 2000, by first-class, postage prepaid, U.S. Mail, copies of the foregoing APPLICATION FOR REVIEW to the following:

Richard-Michelle Eyre
REC Networks
P.O. Box 2408
Tempe, AZ 82580-2408

Henry E. Crawford, Esq.
Smithwick & Belendiuk, P.C.
1990 M Street, N.W., Suite 510
Washington, D.C. 20036

John A. Karousos
Chief Allocations Branch
Federal Communications Commission
445 12th Street, S.W., Room 2C-207
Washington, D.C. 20554

A handwritten signature in black ink, appearing to read 'Millie Adams', is written over a horizontal line.

Millie Adams